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Constitutional Law--Obscenity

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martial. They are: (1) trial in the United States with the attendant logistical problems and, perhaps even more important, lack of authority for demanding the appearance of foreign nationals as witnesses; (2) trial by a foreign country with no guarantee of the safeguards deemed so important to the Court's decision; or (3) no trial by either.

None of the three would appear as satisfactory as trial of civilians by military court martial, which would be administered by citizens of the United States, under United States law, with procedure and safeguards controlled in their entirety by the Congress of the United States.

C. R. S.

CONSTITUTIONAL LAW—OBSCENITY.—This case involves two separate fact situations. In the first *D* was engaged in the publication and sale of books, photographs, and magazines. He was convicted of mailing obscene circulars and an obscene book in violation of the federal obscenity statute. 64 STAT. 194, 18 U.S.C. § 1461 (1950). In the second case, *D* was convicted of keeping for sale obscene and indecent books, and with composing obscene advertisements of them in violation of the State Penal Code. CAL. PENAL CODE ANN. § 311 (West 1955). *Held,* affirming the convictions, that obscenity is not within the area of constitutionally protected speech or press guaranteed by the first and fourteenth amendments. *Roth v. United States,* 77 Sup. Ct. 1304 (1957).

Expressions found in numerous opinions of the Supreme Court demonstrate a tacit assumption that obscenity is not within the area of free press protected by the first and fourteenth amendments. *Beauharnias v. Illinois,* 343 U. S. 250 (1951); *Near v. Minnesota,* 283 U.S. 697 (1930); *Ex parte Jackson,* 96 U.S. 727 (1877). Relying on this premise, the Court in the principal case attempts to compound a test whereby it can determine whether matter is or is not obscene, and consequently does little to clear up the already confused state regarding obscenity. For nowhere in the law has the search for a workable standard encountered more confusion than in the attempt to find a test for determining whether a publication is or is not obscene. Marks, *What Is Obscenity Today?,* 73 U.S.L. REV. 217 (1939).

One of the earliest tests of obscenity was adopted in *Regina v. Hicklin,* L.R. 3 Q.B. 360 (1868). It allowed material to be judged

merely by the effect of an isolated excerpt upon particular susceptible persons. This test, although followed at first in the United States, *United States v. Kennerley,* 209 Fed. 119 (S.D.N.Y. 1913); *United States v. Bennett,* 24 Fed. Cas. 1093 No. 14,571 (C.C.S.D.N.Y. 1879), has for the most part been rejected. See, *United States v. One Book Ulysses,* 72 F.2d 705 (2d Cir. 1934); *Clark v. United States,* 211 Fed. 916 (8th Cir. 1914).

Criticizing the *Hicklin* case test as too restrictive, the Court in the principal case substitutes this test: "Whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to the prurient interest." At page 1311. *D* contended that by this test obscenity would not mean the same thing to all people at all times. The Court answered *D*'s argument by saying that a lack of precision is not itself offensive to the requirements of due process. At page 1312. However, in *Winters v. New York,* 333 U.S. 507 (1948), the Court said that a crime must be defined with appropriate definiteness. Vagueness may also arise from uncertainty in regard to the applicable test to ascertain guilt. *Smith v. Cahoon,* 283 U.S. 553 (1930); *United States v. Cohen Grocery Co.,* 255 U.S. 81 (1920). The failure of a statute to give fair notice of what acts will be punished, and such statute's inclusion of prohibition against expressions protected by the first and fourteenth amendments violates an accused's rights to freedom of press. Men cannot be required to guess at the meaning of an enactment, and a statutory interpretation which includes prohibition of an act fairly within the protection of free speech is void. *Winters v. New York, supra.*

Under our system of government there is an accommodation for the widest variety of taste. What has educational value or what is good art varies with individuals. *Hannegan v. Esquire,* 327 U.S. 146 (1946). It is therefore significant to note that Lillian Smith's *Strange Fruit* was adjudged obscene in Massachusetts though it did not make a similar impression in other jurisdictions. *Commonwealth v. Isenstadt,* 318 Mass. 543, 62 N.E.2d 840 (1945). Hemmingway's *To Have and Have Not,* was removed from public sale and public library circulation in Detroit in 1938, but continued to sell at a brisk pace elsewhere. As recent as 1905 the Brooklyn Library excluded from children's rooms, *The Adventures of Tom Sawyer* and *The Adventures of Huckleberry Finn,* the latter having been banned from the public library in Concord, Massachusetts as "trash and suitable only for the slums". GELLHORN, INDIVIDUAL FREEDOM AND

GOVERNMENTAL RESTRAINTS, 56 (1956). In light of this great diversity of opinion throughout the country, it appears that the Supreme Court has not created a satisfactory test whereby it could be the judge of what is or is not obscene throughout the whole United States.

The Court, on the same day the principal case was decided, went even further in its crusade against obscenity by affirming a New York court which permitted an injunction to be issued, without a hearing, to prevent the sale of literature alleged to be obscene. *Kingsley Books v. Brown,* 77 Sup. Ct. 1325 (1957). This leaves open the widest conceivable inquiry, the scope of which no one can adequately guard against. *Winters v. New York, supra; United States v. Cohen Grocery Co., supra.* Those who urge increased repression of allegedly obscene books are, of course, convinced that obscenity can be identified. In reality, however, the word does not refer to a thing so much as a mood. Its dimensions are fixed part by eye of the individual beholder and part by generalized opinion. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956); HAUGHT, BANNED BOOKS (2d ed. 1956).

It is submitted, therefore, that the Court should either abandon any attempt to create a test for obscenity and give the broad sweep of the first and fourteenth amendments full support, or limit is censorship to only "hard core" pornography. (This term itself may be equally as difficult to define or create a test for, but its use would narrow the censor's scope of material.)

Although there may be nothing of any possible value to society in a particular book, it is as much entitled to the protection of free speech as the best of literature. *Winters v. New York, supra.* For so long as these statutes may be construed by any court to include writings which are other than pornographic, a constant threat to the free press exists. Note 40 ILL. L. REV. 417 (1946).

J. E. J.

CONSTITUTIONAL LAW—SMITH ACT—REQUIREMENT OF WORDS OF INCITEMENT.—Petitioners, fourteen leaders and organizers of the Communist Party in California, were convicted of conspiring (1) to advocate and teach the duty and necessity of the overthrow of the Government by force and violence and (2) to organize, as the Communist Party of the United States, a society to so advocate and teach in contravention of the Smith Act. The indictment was